

Extra-Marital Children (*Walad Al Zina*) and Their Inheritance Rights under Islamic Law: A Comparison of Islamic Law and South African Common Law

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Abstract

Islamic law apportions different responsibilities to males and females because Allah created men with greater physical strength if compared to female counterparts. As a result of this men are mandated to be the protectors and financial providers to women and are given more inheritance if compared to women because of such responsibility. This justification of discrimination is likely to be challenged very soon. Any child born from unmarried parents and adultery (*zina*) is stigmatised as *walad al zina* (extra-marital child) for his entire life and is forbidden from inheriting an estate of his biological father. This exclusion constitutes an unfair discrimination against extra-marital children and is an affront to their human dignity. A comparison conducted shows that the South African common law does not discriminate between males and females and extra-marital child is not forbidden from inheriting the estate of his deceased biological father.

Keywords: extra-marital children under Islamic law, disqualification from inheritance, violation of equality rights.

JEL Classification: K15, K36

1. Introduction

Any form of illicit sexual intercourse such as the pre-marital one is a taboo in Southern African Development community (SADC) in general and many cultural groups do not permit it.³ Islamic law also forbids any form of illicit sexual intercourse and only permit sexual intercourse within the confines of a lawful marriage. Since Muslims believe that illicit sexual intercourse is disgraceful and a sin that is an entrance to other forms of evil, they try anything humanly possible to avoid it. One of the means to avoid the sin of illicit sexual intercourse such as fornication and adultery (*zina*) in Muslim societies is the general permissibility of an early marriage or child marriage.⁴ In our contemporary society where almost everything in our vicinity encourages illicit sexual relations, Muslims encourages their children to consummate marriage relationships as early as possible to avoid *zina*. If it is true that to err is human and to forgive is divine, it means that there is always a possibility for some individuals or group of people to backslide and find it difficult to evade the sin of fornication or adultery (*zina*). If a person is tempted to partake in the sin of *zina* and finally partakes in it, such a person is severely punished together with his or her culprit in Islamic law. The sin of the parents also affects even the offspring who is a product of *zina* because such an offspring would be stigmatised as *walad al zina* (extra-marital child) and carries such a bad social stigma for the entire days of his or her existence. The social stigmatisation of an extra-marital child is clearly reflected in his or her exclusion from enjoying certain rights and duties that are enjoyed by other children who are born from married couples. The child born within the confines of a conjugal relationship is entitled to the right of inheritance, guardianship, and maintenance from both parents. On the contrary, a non-marital child belongs to the lineage (*nasab*) of his mother and has no affiliation whatsoever with his or her natural father. As a result of this, an extra-marital child is not entitled to inherit from his natural father or get any form of financial support or maintenance.⁵ The aim of this paper is to assess whether

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³ Ngema Nqobizwe Mvelo and Ndaba W. J., "Should We Abolish the Delict of Seduction in Customary Law: Quo Vadis South Africa?" 2022 (43) 1 *Obiter* at 167.

⁴ Ngema Nqobizwe Mvelo, "Child Marriages in Zimbabwe: A Time to Treat the Cause and not the Symptoms", 2021 (10) Special Issue, *Perspectives of Law and Public Administration*, 71-80; Ngema Nqobizwe Mvelo "Child Marriages in the Context of Bangladesh's International Human Rights Obligations", 2022 (11), Issue 3, *Perspectives of Law and Public Administration*, 448-455.

⁵ Mujuzi J.D., "The Islamic Law of Marriage and Inheritance in Kenya", 2021, (65) 3, *Journal of African Law*, 377-401 at 378.

the Islamic law of succession unfairly discriminates against extra-marital children or not. Since under Islamic law, the place of a woman is most of the time in the kitchen and to do house chores, have little employment opportunities because they are normally given out to marriage at an early stage,⁶ it perpetuates the cycle of poverty. This paper is separated into four parts. The first part will discuss the inheritance of males, females, and extra-marital children under Islamic law of intestate succession, the second part will discuss the justification of giving more inheritance to males than females in Islamic law. The third part of the paper intend to discuss the exclusion of extra-marital child from inheriting an estate of his deceased father versus the right to equality, and the fourth part will discuss the common law position regarding the issue of the inheritance of females and extra-marital children. Without any further delay, the following section would commence by the discussion of the right of male, female, and extra-marital child's right to inherit in terms of Islamic law.

2. Male, female and extra-marital child's right to inheritance in terms of Islamic law

The Quran is very clear about the portion to be received by a daughter and a son during inheritance. It provides that the male is eligible to have a lion's share of the estate if compared to female counterparts because males receive a portion that is equivalent to that of two females.⁷ If the deceased Muslim died without leaving a son behind, a surviving daughter or daughters are referred to as sharers. If the deceased Muslim is only survived by the daughter, she would be entitled to receive one half of her deceased parent's estate. In an event where a deceased Muslim is survived by more than one daughter, they would be expected to apportion the estate of their deceased parent into equal shares. The presence of a son changes the whole situation because he is always entitled to a lion's share that is equivalent to a share of two females and her sister is regarded as a residuary that is entitled one half of her brother's portion.⁸ If the sons and daughters predeceased their deceased parent but are survived by their female offspring, their female offspring would be partakers in the division of wealth that is left behind and are expected to share equally. Supposing that sons were also existing, their female offspring would inherit one half of their stake as residuary.

The Quran has clearly specified the portions of a full sister and a full brother.⁹ This Quranic verse mandates that before a relative can be considered for inheritance, the deceased must have died without leaving behind a child or parents or grandparents. As a result of this, if a deceased Muslim is only survived by his one and only sister, his sister will be permitted to receive one half of her brother's wealth. If more than one sister is present, the group of sisters will apportion two thirds of the estate equally amongst themselves as a collective.

The noble Quran also make provision for the inheritance of the mother and the father to the deceased's estate.¹⁰ This Quranic verse shows beyond any doubt that the father and the mother of the dead cannot be prevented from receiving a bequest when they are still alive because they are regarded as principal partakers to the property of the deceased. If the dead has left behind an offspring before his demise, the deceased's father gets one-sixth of the estate as a sharer. In a situation where there is no child or grandchild, the father inherits as a residuary. If the deceased has left behind only the daughters or son's daughters, the father inherits as both the sharer and the residuary.

If the dead has not left behind any offspring or grandchildren, his mother is allotted third of the property provided that the departed is not survived by more than one sister or brother.¹¹ If the dead has left behind two or more brothers and sisters or just one brother and sister, the mother will

⁶ Ngema Nqobizwe Mvelo & Ndlovu Lonias, "The Custody of Minor Children During the Dissolution of Marriages: A Comparison of Child Custody in South African Islamic Law and Common Law", 2021, (10) 2, *Perspectives of Law and Public Administration*, 102-113.

⁷ Quran 4: 11.

⁸ Hamid Khan, *Islamic Law of Inheritance: A Comparative Study*, 1980, at 49.

⁹ The Quran 4: 176, see also David S Powers, *Islamic Law of Inheritance Reconsidered: A New Reading of Q. 4: 12*, 55 „*Studia Islamica*” (1982), 61.

¹⁰ Rautenbach C. and Goolam NMI 'Religious Legal Systems: Law of Succession' in Rautenbach C, Bekker JC and Goolam (eds) *Introduction to Legal Pluralism*, LexisNexis, 2010, at 348.

¹¹ *Ibid* at 348.

be entitled to receive the mother's stake of one-sixth.¹²

The Quran is generous enough not to exclude the portions of half-sister and half-brother.¹³ This Quranic verse makes no differentiation based on sex of the siblings and both the half-brother and half-sister are entitled to receive equal portion. If there is only one sibling, he would receive one sixth of the allotted portion. If there are many siblings, they equally split one-third of the property between themselves. Notably, the latter mentioned uterine siblings may only qualify to inherit if the deceased is not survived by any child or paternal grandchild or father.¹⁴

The husband or the wife of the deceased is entitled to a portion in the deceased's estate, and this is endorsed by the noble Quran.¹⁵ The interpretation of the above-mentioned Quranic verse shows that widowed spouses would get one fourth of their wives' wealth if she is survived by a child. A child refers to her direct child or paternal grandchild. Widowed husband would receive one half of the estate if his wife left no such child. On the contrary, a widowed wife would receive one-eighth of the property if her late husband left an offspring and receive one fourth when her husband left no such child.¹⁶

Both the *Maliki* and *Shafi'i* Islamic schools of thought (*madhab*) agree that there is no legal connection whatsoever between the natural father and his non-marital offspring. They are extremists who go too far because they permit a natural father to tie the knot with his extra-marital female offspring and a brother tie the knot with his extra-marital half-sister.¹⁷ On the contrary, *Hanafi* and *Hanbali* schools of thought (*madhab*) differentiates between blood relationship of an extra-marital offspring with his father with other forms of relations such as birth right. Therefore, they forbid a conjugal relationship between the natural father and his non-marital female offspring or between a brother and his extra-marital sister. Notably, the denial of bequest to *walad al zina* (non-marital offspring) from his natural father is an acceptable norm in Islamic law that runs like a golden thread in *Maliki*, *Shafi'i*, *Hanafi* and *Hanbali* schools of Islamic thought (*madhab*).¹⁸ In a similar vein, there is consensus amongst many scholars of Islamic law that an extra-marital child is not entitled to maintenance, custody, guardianship, and inheritance against his or her biological father.¹⁹

3. Justification for giving more inheritance to males than females in Islamic law

Islamic law does not allocate portions of inheritance according to the gender of an heir but according to the condition of financial responsibilities that are legally given to each person. Whoever is given more financial burdens is entitled to greater portion of inheritance, because common sense dictates that it would constitute injustice to allot more financial burdens and responsibilities to males that outweigh those allotted to females and at the same time give equal portion of inheritance to both. According to Islamic law women are not bothered with financial duties to her family and this responsibility is merely imposed to men.²⁰ The Quran makes it categorically clear that Allah created men with more strength than their female counterparts and because of this extra physical strength

¹² Ibid, 348.

¹³ The Quran 4: 12.

¹⁴ Rautenbach C. and Goolam NMI, *op. cit.* at 348; Hamid Khan, *op. cit.*, at 50.

¹⁵ The Quran 4: 12.

¹⁶ Hamid Khan, *op. cit.*, at 46-47.

¹⁷ Ansari-Pour MA "The Legal Relationship of a Father with his Illegitimate Child under Islamic and Iranian Law" (1999-2000) 6 Yearbook of Islamic and Middle Eastern Law 140-155 at 145.

¹⁸ Ibid at 146.

¹⁹ Mujuzi JD, "The Islamic Law of Marriage and inheritance in Kenya", 2021 (65) 3, *Journal of African Law* 377-401 at 378; Khalequzzaman ASM "Inheritance Status of Illegitimate Children under Muslim Law", 2018 (18) 1, *Bangla vision Research Journal* 33-34; Ahmad Ibrahim, "Blood Relationship as a Ground of Inheritance under Islamic Law" 1979 (6) 2, *Journal of Malaysian and Comparative Law* 163-238 at 205; Safir Syed, "The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child: The Plight of Non-Marital Children under Sharia", 1998, (6), *The International Journal of Children's Rights*, 359-393; Ghanem I "Islamic Medical Jurisprudence" 1981 (21) *Medicine, Science and the Law* at 280; Schacht J., *An Introduction to Islamic Law* (Oxford, 1964) at 168; Fyzee A., *Outlines of Muhammedan Law* (London, 1964) at 215; Coulson N.J., *Succession in the Muslim Family* (Cambridge, 1971); Mustafa Mzee, "Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of Deceased Father: A Tanzanian Case Study" 2016 (45), *Journal of Law, Policy and Globalisation*, 55 at 57; Siddiqui AA "Children's Rights within the Moslem Family", 1994 (11), *International Children's Rights Monitor* 05.

²⁰ Hammudah Abd Al Ati, *The Family Structure in Islam* (1977) at 269.

they have a duty to protect women and to maintain them according to the level of their means.²¹ Zahab Chaudhry has cautioned against erroneously interpreting the latter mentioned verse as illustrating Islamic position on absolute superiority of men to women.²² According to Islamic law a woman is not under any legal duty to maintain anyone. This mammoth task of supporting the entire family members rest upon the shoulders of male members of the kindred. If for example, the father dies, her daughter whether unmarried or divorced would be entitled to be taken care of by her male paternal relatives.²³ A brother has a responsibility to maintain his sister and a son has a responsibility to maintain his widowed mother and other people who were dependents of his father while he was alive.²⁴ So in justifying the fact that females receive less percentage of inheritance than their male counterparts, one of the commentators in Islamic law submitted that the noble Quran acknowledges the significance of balancing gender roles and responsibilities and it comes as no surprise that it eases the huge economic demands made on males by giving them a lion's share in inheritance if compared to their female counterparts.²⁵ In a similar vein, Khan justified the different portions that are received by males and females in certain situations as not constituting gender-based discrimination by indicating that it is a "natural corollary of the difference in economic responsibilities and roles of the two sexes in a Muslim society."²⁶

This justification for giving less inheritance to women is like the application of the principle of male primogeniture that once formed the basis of customary law of succession and inheritance in South Africa even though there are some variations there and there. The successor inherited both benefits together with duties such as care and support for the family members.²⁷ In the Constitutional Court case of *Bhe*,²⁸ the Court recognised that the context in which the principle of male primogeniture applied has drastically changed²⁹ and decided to reflect the changed circumstances in our society where successors do inherit the property of the deceased and fail to fulfil their responsibility to support and maintain the deceased's family. The principle of male primogeniture excluded widows from inheriting as intestate heirs from their deceased husbands, excluded a daughter from inheriting from her dead father, excluded young son and an extra-marital child from inheriting his biological father. The Court held that these exclusions are based on gender and constituted a violation of equality, dignity, and the rights of children. The Court rejected the customary heir's responsibility to support as a justification for the limitation that the rule imposes on the rights of women and children. Therefore the Constitutional Court declared the principle of male primogeniture as unconstitutional and *null and void*. This leaves a thought-provoking question about the constitutionality of the Islamic rule of inheritance that permits males to receive more inheritance than females. As already mentioned earlier, Islamic law does not apportion the deceased's estate based on the gender of an heir but according to the condition of financial responsibilities that are legally given to each person. Whoever is given more financial burdens is entitled to greater portion of inheritance, because common sense dictates that it would constitute injustice to allot more financial burdens and responsibilities to males that outweigh those allotted to females and at the same time give equal portion of inheritance to both. According to Islamic law women are not bothered with financial responsibility of supporting the entire family and this burden is merely imposed to men.³⁰ The latter justification of differentiation between the portions received by males and females might no longer

²¹ The Quran 4: 34.

²² Zahab Chaudhry "The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law", 1998 (3) 01, *Journal of Islamic Law* at 81.

²³ Nasir JJ, *The Islamic Law of Personal Status* (2nd ed. 1990) 156 & 194.

²⁴ Hamid Khan, *Islamic Law of Inheritance: A Comparative Study* (1980) at 217.

²⁵ Camya Al Faruqi, *Women, Muslim Society, and Islam* 4, 6 (1988) at 39.

²⁶ Hamid Khan, *op. cit.* at 217.

²⁷ Bekker J.C., *Seymour's Customary Law in Southern Africa* (1989) at 297-303; Du Plessis and Rautenbach "Law of Succession and Inheritance" in Joubert, *Faris and Church* (eds) LAWSA vol. 32 (2009) at para. 214.

²⁸ *Bhe v. Magistrate, Khayelitsha* (Commission for Gender Equality as amicus curiae); *Shibi v. Sithole*; South African Human Rights Commission v. President of the Republic of South Africa 2005 (1) BCLR (CC).

²⁹ *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as amicus curiae); *Shibi v Sithole*; South African Human Rights Commission v President of the Republic of South Africa 2005 (1) BCLR (CC) para 80.

³⁰ Hammudah Abd Al Ati, *op. cit.* at 269.

hold water in our new constitutional dispensation that is grounded on the value of equality and this debate is better left for another day. For this paper, the focus would be on the prohibition of extra-marital children from obtaining their birth right. Such an exclusion of an extra-marital child from succeed to the property of his or her deceased father is likely to encroach upon his or her equality rights and the following section intends to assess whether it really constitutes such a violation.

4. Extra-marital children's exclusion from inheriting their biological father versus the equality test

As already mentioned earlier, non-marital children are illegible to inherit from their natural father and his lineage in general because they were conceived and born out of marital relationship. This has an impact on their equality rights. The equality clause affords equal protection to everybody and makes it clear that everyone is entitled to equal benefit of the law. Obviously, the drafters of the Constitution never anticipated to exclude anyone based on the conditions surrounding his or her birth because birth is included as one of the prohibited grounds of discrimination. This validates an assumption that the equality clause is broad enough to protect children born from Muslim parents and afford them equal protection of the law and full enjoyment of benefits that comes with it. Unfair discrimination is prohibited against anyone whether it is direct or indirect.³¹ This shows that the drafters of the Constitution anticipated that there would be some form of differentiation one way or the other but decided only to prohibit unfair discrimination. In determining the constitutionality of any conduct or provision that seems to be discriminatory upon a person or a group of people, the Constitutional court has developed the multi-stage test in the case of *Harksen v. Lane*.³² The initial phase of the test is to assess whether the ineligibility of non-marital offspring from receiving inheritance discriminates amongst individuals or group of people. An answer is a big yes. A *walad al zina* (non-marital child) is ineligible to inherit from his natural father while marital offspring have full enjoyment of their rights as children.

Section 9 (3) of the Constitution specifies the prohibited grounds of discrimination and birth falls under the one of those prohibited grounds. So, the exclusion of extra-marital children from inheritance merely because they were not conceived and born within a marriage is a direct discrimination on a listed ground of birth. Common sense dictates that it is beyond the reach of any person born of a woman to choose the kind of the parents he wants, family or a place to be born. You cannot choose to be born from married or unmarried parents and it is unfair for that person to be prejudiced based on something that is beyond anyone's control.

The second phase of the test is to assess whether the discrimination is fair or not.³³ In doing so, it is of crucial importance to evaluate the effects of discrimination on the victim or the complainant.³⁴ Judge Goldstone held that some issues have to be considered when measuring the effects of discrimination on the victim, namely: (a) the social status of a victim and whether he suffered discrimination in the past; (b) the purpose of discrimination is another factor to be considered in judging fairness of a discriminatory provision or conduct; and (c) whether the differentiation has resulted to the harm of the victim's dignity or not. Getting back to the above factors, the social status of extra-marital children is in a bad shape because they are stigmatised as *walad al zina* who have no relationship of any kind with their biological fathers. Hence, they cannot get inheritance from their biological fathers. However, the purpose of depriving extra-marital children from getting inheritance is not clear and do not seem to serve any important societal goal. The discrimination against extra-marital children is an attack to their dignity. The interpretation of the equality test that was illustrated in *Harksen's* case in conjunction with some constitutional provisions³⁵ and some Constitutional Court

³¹ Section 9 (3) of the Constitution, 1996.

³² *Harksen v. Lane* 1998 (1) SA 300 (CC).

³³ *Ibid* at para 5.

³⁴ *Harksen v. Lane* 1998 (1) SA 300 (CC) para 50-51.

³⁵ Section 1 (founding provisions), section 7 (in chapter 2), section 36 (the limitation clause), and section 39 (interpretation clause).

decisions³⁶ shows beyond any doubt that our legal philosophy on equality focused on human dignity as a constitutional value. The value of human dignity in our constitutional adjudication was also emphasised by O'Regan J.³⁷ His emphasis affirms our legal philosophy on equality which identifies equality as not a standalone right but as a right that should be informed by another constitutional value. The societal goal of prohibiting sexual intercourse between unmarried persons and adultery is to uphold religious morality and public decency. However, to deny non-marital offspring from getting inheritance from their natural father is an affront to their dignity and is not likely to serve any important societal goal.

5. The South African common law position

Unlike the Islamic law where a testator is restricted to bequeath up to one third of his estate by means of a will, the South African common law gives a testator an unrestricted freedom of testation and he can bequeath his entire estate in a will.³⁸ Ascendants inherits together with descendants under Islamic law while under the South African common law of intestate succession the presence of descendants eliminates ascendants from inheritance.³⁹ Common law does not promote the provision of different shares to males and females. It also does not exclude extra-marital children from inheriting the estate of their biological father. The South African law of intestate succession has not yet given legal recognition to Islamic law of succession and if any South African Muslim dies intestate his estate will devolve according to the Intestate Succession Act.⁴⁰ However if a Muslim wants his estate to devolve according to Islamic law of succession when he dies, he can incorporate a clause in his will that might speak as follows: "I hereby bequeath my whole estate to my heirs to be determined at the time of my death in accordance with, and in the proportions specified by, the Islamic law of succession. A certificate furnished by an expert in that law, or a qualified Muslim theologian, setting forth my heirs and their respective shares according to the Islamic law of succession, shall be final and binding."⁴¹

The latter mentioned clause has a strong possibility to be accepted as obligatory by the office of the Master of the High Court if it conforms to all the rules of a valid will. It is important to attach the certificate of an *imam* (a Muslim theologian) in the original will to show how the will must be distributed between the heirs. Since Islamic law of succession differentiates between males and females when comes to the issue of inheritance and the fact that it excludes extra-marital children from inheriting the estate of their biological fathers might lead to some legal battles concerning inheritance discrimination soon.

6. Conclusion

As already mentioned earlier, both the *Maliki* and *Shafi* Islamic schools of thought (*madhab*) agree that there is no authorised affiliation of any kind between the natural father and his extra-marital kid. According to them a natural father can even tie the knot with her non-marital offspring and a brother may get married to his extra-marital sister. However, the *Hanafi* and *Hanbali* schools of thought (*madhab*) rejects the marriage of a biological father and his extra-marital daughter and a marriage between a brother and his extra-marital sister. It is however noticeable that Maliki, Shafi, Hanafi, and Hanbali agree with one voice that an extra-marital child cannot inherit from his biological father and this form of discrimination directed against extra-marital children is an acceptable norm in Islamic law. This poses a serious problem in the South African legal order that is founded on the value of equality, and this places a mandate on South Africa to always strive to promote and protect

³⁶ *Prinsloo v. Van der Linde and another* 1997 (3) SA 1012 (CC) para 31; *Dawood and others v. Minister of Home Affairs and others* 2000 (8) BCLR 387 (CC) para 35.

³⁷ *Dawood and others v. Minister of Home Affairs and others* 2000 (8) BCLR 387 (CC) para 35.

³⁸ Rautenbach C & Goolam NMI, *op. cit.* at 352.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Omar, *The Islamic Law of Succession* (1988) at 11.

an egalitarian society for all. The unfair discrimination of extra-marital children under Islamic law does not appear to serve any important societal goal and is therefore a violation of their right to equality and dignity and unconstitutional.

Islamic law also discriminates between males and females when comes to the issue of inheritance. Males always receives a lion's share of inheritance if compared to their female counterparts. They justify such discrimination by indicating that Islamic law places a huge financial burden of supporting the family financially on the shoulders of males to the exclusion of females and to allot equal share between males and females would constitute injustice. This is like the reason that was given for the principle of male primogeniture that once applied under African customary law and the Constitutional court declared it as unconstitutional because it constituted discrimination based on gender. The justification for giving more inheritance to males than females is also not likely to pass constitutional muster, but such a debate is better left for another day.

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